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Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE
UNITED STATES

October Term, 1971

No._____

ROBERT E. POFF, doing
business as 1st KING,

Petitioner,

vs.

THE DEPARTMENT OF ALCOHOLIC
BEVERAGE CONTROL OF THE
STATE OF CALIFORNIA and THE
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD OF THE STATE
OF CALIFORNIA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

McPHERSON BERRIEN E. MOORE,
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PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

Petitioner, ROBERT E. POFF, respectfully prays that a writ of certiorari be issued to review the final judgment of the Court of Appeals of the State of California entered in the above matter on February 24, 1972.

OPINIONS BELOW

The written decision of the Department

of Alcoholic Beverage Control suspending Petitioner's license for 30 days is set forth in Appendix A. The opinion of the Alcoholic Beverage Control Appeals Board affirming the suspension is set forth in Appendix B. The order of the Court of Appeals denying a petition for writ of review was made without opinion (Appendix C). The order of the Supreme Court of the State of California denying a hearing was also made without opinion (Appendix D).

JURISDICTION

The jurisdiction of this court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Is the Alcoholic Beverage Control Act of the State of California unconstitutional insofar as it permits the Department of Alcoholic Beverage Control to revoke a license upon a determination that live entertainment is obscene or is contrary to public welfare or morals after an administrative proceeding without requiring the Department to seek a judicial determination on the subject.

2. Is the power of the Department of Alcoholic Beverage Control to suspend or revoke a license for conduct contrary to public welfare or morals unconstitutionally broad when applied to speech and expression protected by the First Amendment.

3. Was the Department's finding that the events described in the decision were contrary to public welfare or morals supported by evidence sufficient to satisfy the requirements of the First and Fifth Amendments.

4. Is it a denial of due process for a state court to deny judicial review without reviewing the administrative record when the appeal involves disputed questions of fact.

STATUTORY PROVISIONS INVOLVED

Article XX, Section 22 of the California Constitution which provides in relevant part:

> "The Department shall have the power, in its discretion, to deny, suspend or revoke any specific alcoholic beverages license if it shall determine for good cause

that the granting or continuance of such license would be contrary to public welfare or morals, or that a person seeking or holding a license has violated any law prohibiting conduct involving moral turpitude."

California Business and Professions Code Section 24200.

The following are the grounds which constitute a basis for the suspension or the revocation of licenses:

(a) When the continuance of a license would be contrary to public welfare or morals; the proceedings under this section upon this ground are not a limitation upon the Department's authority to proceed under Article XX, Section 22 of the Constitution.

STATEMENT OF THE CASE

Petitioner, ROBERT E. POFF, has been and now is the holder of a bona fide on-sale general license issued by Respondent, DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL permitting him to engage in the activities

permitted by said license at 14401-14403 South Western Avenue, Gardena, California. Said premises are known as and do business as the "1st King."

On February 13, 1970 the Department of Alcoholic Beverage Control (ABC) filed an accusation against Petitioner which alleged that he had permitted or suffered his licensed premises to be used in a manner contrary to public welfare or morals. At the hearing on said accusation it was combined with previous accusations filed against Petitioner. The three combined accusations alleged that on fifteen separate occasions, female entertainers had performed on the stage at Petitioner's licensed premises while completely nude, that while completely nude said entertainers performed various acts specified in the accusation, and that in certain of the instances, members of the audience had made various comments as set forth in the accusations. The accusations further alleged that the acts specified therein were cause for suspension or revocation of Petitioner's license pursuant to Article XX, Section 22, of the Constitution of the State of

California, and Section 24200(a) of the Business and Professions Code, in that said acts were contrary to public welfare and morals.

On February 20, 1970, June 4, 1970, August 4, 1970 and August 12, 1970 a hearing on said accusations was held before Helen L. Gallagher, a hearing officer of the California Office of Administrative Procedure duly appointed to hear the case.

On November 5, 1970 the hearing officer submitted her proposed decision to the Department which was adopted by it as its decision on December 3, 1970. Said accusation is attached hereto as Appendix A and made a part hereof by reference.

Petitioner duly filed his notice of appeal from the decision of the Department to Respondent Alcoholic Beverage Control Appeals Board. Written briefs were filed, and on May 27, 1971, oral argument was heard by the Appeals Board. On January 18, 1972 the Appeals Board issued its written decision affirming the order and decision of ABC. A true and correct copy of the decision of the Appeals Board is contained

in Appendix B and incorporated herein by reference.

On February 17, 1972 Petitioner duly filed a petition for writ of review with the Court of Appeal of the State of California for the Second Appellate District pursuant to Sections 23090, et seq. of the California Business and Professions Code. Said petition was denied on February 24, 1972.

On March 3, 1972 Petitioner duly filed a petition for hearing in the Supreme Court of the State of California. Said petition for hearing was denied on March 22, 1972. Both of said denials were made without opinion and are set forth in Appendixes C and D.

All of the findings of fact contained in the decision are supported by the evidence or by stipulation, with the singular exception of the finding that the various described acts were contrary to public welfare or morals. It is Petitioner's contention that there was no evidence offered to support that latter determination. Moreover, other evidence not reflected in

the decision was also presented by Petitioner.

Petitioner offered into evidence the docket sheets of the criminal cases filed as a result of the incidents set forth in the accusation. These docket sheets showed that the defendants in each case were either found to be not guilty or that the case was dismissed in the interest of justice (RT p. 66; Exhibit C).

John L. Wasserman, a critic employed by the San Francisco Chronicle, testified for Petitioner (RT p. 70). Mr. Wasserman, after qualifying as an expert witness, testified that nude entertainment in bars conforms to the contemporary community standards of the State of California (RT p. 79). He further testified that such nude dancing was entertainment (RT pgs. 85-86). In Mr. Wasserman's opinion, nude dancing on stage does not offend the public welfare or morals (RT pgs. 90-91). On redirect examination, Mr. Wasserman testified that nude entertainers who, while performing on a stage, exposed their vaginal areas and anus do not exceed contemporary community standards in the State of California (RT p. 112). He further testified that the

existence of other facts described in the accusation would not change his opinion (RT p. 113).

Petitioner, ROBERT E. POFF, testified in his own behalf (RT p. 115). He testified that a cover charge is imposed when nude entertainment is presented, that couples frequently attend the show, that minors are not permitted to enter. He further testified that signs outside the premises advise that nude entertainment is presented. The bulk of Petitioner's patrons are repeat customers; he knows of no incident of a dancer being molested or of a patron getting onto the stage. Petitioner further testified that the standard performance involves the performer coming on stage dressed in clothes in which she dances to two songs, that she then dances topless for two songs, and finally dances nude for two songs (RT pgs. 115-120).

Doctor Stanley K. Fitch, a Professor of Psychology at El Camino College, testified on behalf of Petitioner (RT pgs. 127-128). Dr. Fitch testified that the presentation of nude dancing on a stage in a bar before an audience of pre-advised

adults is not injurious to public welfare or morals (RT p. 132). He further testified that there was no connection between nude dancing and anti-social behavior (RT p. 138).

REASONS RELIED ON FOR ALLOWANCE OF WRIT

I

THE ALCOHOLIC BEVERAGE CONTROL ACT IS UNCONSTITUTIONAL INSOFAR AS IT PERMITS THE DEPARTMENT TO MAKE A DETERMINATION THAT LIVE ENTERTAINMENT IS OBSCENE OR CONTRARY TO PUBLIC WELFARE OR MORALS IN AN ADMINISTRATIVE PROCEEDING WITHOUT REQUIRING THE DEPARTMENT TO SEEK A JUDICIAL DETERMINATION ON THE SUBJECT.

Under the Alcoholic Beverage Control Act and the Administrative Procedure Act of the State of California, an accusation that a licensee has permitted conduct which is contrary to public welfare or morals is heard at a hearing presided over by a hearing officer who submits a proposed decision to the Department. Bus. & Prof. Code, Section 24210, Gov. Code Sections 11500 et seq. After the decision of the Department is adopted, the licensee may take an appeal to the Alcoholic Beverage Control Appeals

Board, which is also an administrative agency, during which time the Department's decision is automatically stayed. Bus. & Prof. Code, Sections 23080-23089. Judicial review of an adverse decision of the Appeals Board may be obtained only by filing a petition for writ of review to the Court of Appeals, during which time the decision of the Department is stayed only if a stay order is made by the Department or the court. Bus. & Prof. Code, Sections 23090-23090.7. The duty of seeking judicial review is upon the party effected adversely by the decision of the Appeals Board. Bus. & Prof. Code Section 23090.

In a recent case this court held unconstitutional a similar administrative scheme whereby the use of the mails for commerce in obscene materials could be prohibited. Blount v. Rizzi, 400 U.S. 410 (1971), involved the constitutionality of 39 USC Section 4006 which permitted the Postmaster General to return as unlawful mail addressed to a person who is obtaining or attempting to obtain money through the mail for obscene matter, or is depositing in the mail information as to how, where, or from

whom obscene matter may be obtained. (In a 1970 amendment, the section in question was renumbered as Section 3006). A proceeding for such an order foreclosing the use of the mails must be commenced by written complaint and notice of hearing, which is held before a hearing officer who makes a written opinion containing findings of fact and statements of reasons. The pertinent regulations also provide for an administrative appeal within the Post Office Department and no order under Section 4006 may be issued until the administrative proceedings are completed. 400 U.S. pgs. 412-413. Under the provisions of the Federal Administrative Procedure Act, a party adversely effected by a decision of the Postmaster General may seek judicial review, during which time the decision of the Postmaster may be stayed either by him or by the court. 5 USC Sections 701-706. Thus, the administrative circumstances under which the Postmaster General enforced the act in question are virtually identical to the procedural circumstances under which the Department operates.

In Blount the unconstitutionality of

the postal act was based in part upon the grounds that it did not place the burden of initiating judicial review and of proving that the material is unprotected expression on the Postal Department. It was also based upon the ground that prompt judicial review was not required. These same safeguards are lacking in the instant case. As in Blount, the fact that the decision suspending Petitioner's license did not become effective until administrative procedures had been exhausted does not save the procedural scheme, since it was Petitioner who was required to seek and obtain a judicial determination of error.

Blount applies directly to the instant proceedings. It applies all the more if we assume that the Department of Alcoholic Beverage Control is authorized to impose disciplinary action on account of entertainment which is deemed to be contrary to public welfare or morals but need not satisfy constitutional definitions of obscenity. The presentation of such entertainment would then clearly be a form of speech protected by the First Amendment, and the imposition of discipline on account

on such entertainment could not be constitutionally upheld unless grounded upon the most rigorous procedural safeguards. No such safeguards exist or were followed in the instant proceedings. Indeed, the Department by its determination that the conduct involved was per se contrary to public welfare or morals has in effect deprived Petitioner of a fact hearing on that critical issue leaving him as his only remedy the opportunity to "persuade a court" that the Department is in error.

II

THOSE PROVISIONS OF ARTICLE XX, SECTION 22 OF THE CALIFORNIA CONSTITUTION AND SECTION 24200(a) OF THE BUSINESS AND PROFESSIONS CODE WHICH PERMIT THE DEPARTMENT TO REVOKE OR SUSPEND THE LICENSE FOR CONDUCT "CONTRARY TO PUBLIC WELFARE OR MORALS" ARE UNCONSTITUTIONALLY BROAD WHEN APPLIED TO SPEECH AND EXPRESSION PROTECTED BY THE FIRST AMENDMENT.

The doctrine that a statute or regulation may be void because it is overly broad has been succinctly stated by this court in Zwickler v. Koota, 389 U.S. 241 (1967), in which the doctrine of void for

overbreadth was described as meaning that ". . . a government purpose to control or prevent activities constitutionally subject to State regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the areas of protected freedoms." The reason behind this rule is that the existence of such an overly broad statute is in and of itself an inhibition upon the exercise of First Amendment rights, even though attempted enforcement of the law against activities within the protected area could be successfully defended on the constitutional grounds. Dombrowski v. Pfister, 380 U.S. 479 (1965). In Dombrowski, the court said:

> "A criminal prosecution under a statute regulating expression usually involves imponderables and contingencies that themselves may inhibit the full exercise of First Amendment freedoms. See, eg, Smith v. California, 361 U.S. 147. When the statutes also have an overbroad sweep, as is here alleged, the hazard of Loss or substantial impairment of those

> precious rights may be critical. For in such cases, the statutes lend themselves too readily to denial of those rights. The assumption that defense of a criminal prosecution will generally assure ample vindication of constitutional rights is unfounded in such cases. See Baggett v. Bullitt, supra, 377 U.S. at 379. For '[t]he threat of sanctions may deter . . . almost as potently as the actual application of sanctions. . .'" Dombrowski v. Pfister, supra, 380 U.S. at page 486.

In the instant case, the Department has suspended petitioner's license because he permitted the presence of entertainment involving sex which was deemed by the Department of Alcoholic Beverage Control to be contrary to public welfare or morals. The entertainment was not found to be obscene and therefore must be speech protected by the First Amendment. Indeed, the Department originally alleged that the entertainment was obscene and in violation of Section 311.6 of the California Penal Code, but such allegation

was deleted from the accusation after the hearing. If the Department's authority permits it to take disciplinary action in such circumstances, the authority is overly broad and void by virtue of the above cited cases. On the other hand, if the Department's authority to regulate speech is limited by implication to what is obscene under the First Amendment, the decision in the instant case is invalid because the performances were neither alleged to be nor found to be obscene.

In general, forms of communication and entertainment which deal with or depict sex are protected by the First Amendment and may not be prohibited or restricted unless they are judicially determined to be obscene. Roth v. United States, 354 U.S. 476 (1957); Stanley v. Georgia, 394 U.S. 557 (1969); United States v. Reidel, 402 U.S. 351 (1971). As the California Supreme Court has said in respect of the performance of a dance:

> ". . . the performance of such a dance, like other forms of expression or communication prima facie enjoys protection of the

First Amendment of the Constitution of the United States; it loses such protection upon a showing of obscenity." In re Giannini, 69 Cal.2d 563, 72 Cal.Rptr. 655, 658 (1968).

In the instant case, the accusation did not allege that any of the conduct was lewd or obscene. No violation of the Penal Code was alleged or found to have occurred. The Department's decision that the performances were contrary to public welfare or morals must be expressly based upon the proposition that the Department has the authority to regulate such entertainment whether or not it is obscene.

Except as limited by the Twenty-First Amendment the state regulation of alcoholic beverages must comply with the requirements of the United States Constitution. See Wisconsin v. Constantineau, 400 U.S. 433 (1971).

In a case directly on point, a three-judge District Court of the Central District of California held that Rules 143.3 and 143.4 of the Department of Alcoholic Beverage Control were unconstitutional

insofar as they regulated the content of entertainment. The court held that the Department's rules must conform to the constitutional standards for the regulation of obscenity and that the state could not control such entertainment on a standard of public welfare and morals. The court also held that the Department did not have any special powers to regulate entertainment because alcoholic beverage licenses were involved. LaRue v. State of California, 326 F.Supp. 348 (1971), Prob.Jur. noted, California v. LaRue, 92 S.Ct. 559 (1971).

The issues in LaRue are virtually identical with the issues in the instant case, inasmuch as both involve the question of whether the Department's power under Article XX, Section 22 of the California Constitution permit it to impose disciplinary action on account of entertainment which is not obscene.

It is respectfully submitted that a writ of certiorari should be issued in the instant case and the case combined with LaRue, which is now scheduled for hearing in the fall, 1972 term.

III

THE DECISION OF THE DEPARTMENT IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE IN LIGHT OF THE WHOLE RECORD NOR BY FINDINGS IN THAT NEITHER THE FINDINGS NOR THE EVIDENCE CONTAIN FACTS TENDING TO SHOW THAT THE ACTS COMPLAINED OF WERE CONTRARY TO PUBLIC WELFARE OR MORALS.

In the previous argument, we have established that the constitutional authority of the Department is overly broad when applied to activities which fall within the protection of the First Amendment. We will show in the ensuing argument that the record in the instant case does not support a determination that any of the entertainment presented was contrary to public welfare or morals.

In cases under the public welfare or morals clause, assuming such power to be properly invoked in the instant case, the Department of Alcoholic Beverage Control must have before it evidence to establish good cause for its decision. The requirement that there be proper evidence and findings to support a determination that there is good cause for revocation or

suspension of a license has been recognized many times by the California Supreme Court. The Department's power is not absolute "but must be exercised in accordance with the law and the provisions that it may revoke the license 'for good cause' necessarily implies that its decision should be based on sufficient evidence and that it should not act arbitrarily in determining what is contrary to public welfare and morals." Boreta Enterprises, Inc. v. Alcoholic Beverage Control, 2 Cal.3d 85, 84 Cal.Rptr. 113, 120 (1970).

In the Boreta case, the court observed in a case involving topless waitresses:

> "This conduct was not illegal nor was it in violation of any duly issued rule or regulation of the Department. There was absolutely no evidence presented by the Department at either of the hearings which tended to support its conclusion that topless waitresses are contrary to public welfare and morals because they necessarily lead to improper conduct. No

> intemperance, exploitation, or lewd or criminal contact between customers and the waitresses were shown to have occurred on the premises. The challenged conduct in this case did not occur in the presence of juveniles or in the public streets. In sum, there was neither illegal nor improper conduct on the part of the licensee's waitresses. To establish 'good cause' for the revocation of a licensee's license, something more must be shown than that the licensee employed topless waitresses." 84 Cal.Rptr. at pgs. 127-128.

In the instant case, similarly, no rule or regulation of the Department was alleged or proved to have been violated. No section of the Penal Code was alleged or proved to have been violated. No improper conduct was shown to have occurred between the performers and any other person on the premises. (The shouting of various earthy observations and joking invitations to engage in sexual conduct by members of the

audience is not illegal and can hardly be said to exceed standards of conduct for patrons in a bar). No one on the premises was shown to be intemperate as the result of the acts of the dancers, no one was shown to have been exploited, no lewd or criminal conduct was shown to have occurred. No juveniles were shown to be present. No violation of law was established: indeed, the record showed that all of the criminal cases filed against the performers were either dismissed or resulted in acquittals. In short, there was nothing in the record upon which the Department's determination that the conduct was contrary to public welfare or morals could be supported.

As in the case of prohibition of obscenity, in which community standards are deemed to be an objective fact which must be established by proof, the standards encompassed by "public welfare and morals" should also be deemed objective standards susceptible of proof. The fact that the Department may, if it be a fact, take disciplinary action on a lesser standard of proof than obscenity does not negate the protected status of the entertainment under

the First Amendment. The First Amendment demands that the Department be made to prove by competent evidence its allegations that the public welfare and morals have been violated.

Not only has the Department failed utterly to introduce any evidence to meet its burden of proof, but petitioner has introduced substantial evidence to the contrary. Expert witnesses who testified on behalf of petitioner testified that nude dancing on a stage does not offend public welfare or morals nor does it exceed contemporary community standards. There was also testimony that there was no connection between such dancing and anti-social behavior. Petitioner also testified in his own behalf that patrons are fully advised that nude entertainment is going to be presented when they enter his premises, and that he knows of no incidents of a dancer being molested or of a patron getting on stage during such a performance. He also testified that the presentation of nude dancing does not appear to increase

the sale of alcoholic beverages at his premises. Thus, the only substantial evidence in the record shows that the Department was without foundation in determining that the conduct on Petitioner's premises was contrary to public welfare or morals.

IV

CONCLUSION

For the foregoing reasons this petition for writ of certiorari should be granted.

Respectfully submitted,

McPERSON BERRIEN E. MOORE,
KENNETH SCHOLTZ

Attorneys for Petitioner

APPENDIX A

STATE OF CALIFORNIA
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
CERTIFICATE OF DECISION

File 1867
Reg. 9739

Registrations 8858 & 8928 are incorporated in this decision

It is hereby certified that the Department of Alcoholic Beverage Control, having reviewed the findings of fact, determination of issues and recommendation in the attached proposed decision submitted by a Hearing Officer of the Office of Administrative Procedure, adopted said proposed decision as its decision in the case therein on December 3, 1970.

A representative of the Department will call on you on or after January 21, 1971, to pick up the license certificate.

Sacramento, California
Dated: December 3, 1970

Dorothy Pierson
Hearing and Legal Unit

STATE OF CALIFORNIA

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL

In the Matter of the Accusation Against ROBERT E. POFF dba 1st King 14401-03 S. Western Avenue Gardena on-sale general license Respondent under the Alcoholic Beverage Control Act	File 1867 Reg. 9739 Licenses: 47 Time of Hearing: 8-12-70 9 a.m. Place of Hearing: Los Angeles Reporter: Louise Lillico OLA 22892 Appearances: For Dept: Frank Britt, Counsel Doris Jaffe, Counsel For Resp: Mr.Berrien C. Moore Attorney at Law 1515 Redondo Beach Boulevard Gardena 90247

I hereby certify that the following constitutes my proposed decision in the above-entitled matter as a result of the hearing held before me at the above time and place, after due notice thereof having been according to law, and I hereby recommend its adoption as the decision of the Department of Alcoholic Beverage Control.

PROPOSED DECISION

At the commencement of the proceeding, Register 8858 (OLA 22107) and Register 8928 (OLA 22162) were consolidated with Register 9739. Sub-paragraphs one through five of Register 8928 were added to Count I of Register 9739, and numbered seven through eleven; sub-paragraphs one through four of Register 8858 were added to Count I of Register 9739 and numbered twelve through fifteen.

The accusation was amended at the Hearing as follows:

1. By deleting the word "lewd" wherever it appeared in sub-counts 7 through 11 of Count I.

2. By deleting the word "indecently" wherever it appeared in sub-counts 12 through 15 of Count I.

The matter was submitted subject to the right of respondent to submit a document by way of argument, and said document having been received on October 15, 1970, and identified as Exhibit D, and the Department's reply thereto having been received October 23, 1970, and identified as Exhibit "I",

the Hearing Officer finds as follows:

COUNT I

Within one year last past and immediately prior to the date of the accusation, respondent-licensee directly and by and through his agents, employees, and servants, permitted or suffered the above-designated licensed premises to be used in a manner, more particularly described below:

1. On September 10, 1969, respondent did use the services of a female entertainer, Mary Jo Frazzel, to perform on the stage area in the above-designated licensed premises, while completely nude, thereby exposing her private parts, including her pubic hair, vulva, and bare buttocks to the view of persons present in said premises.

a. Said entertainer, while performing on the stage, exposed her vaginal area to approximately forty-five (45) male customers at the location, fifteen of which were sitting at the counter circling the stage, and while so doing performed bumps and grinds while moving to various parts of the stage and

directing her actions toward the male customers in the immediate vicinity.

b. During this nude performance, male customers were heard to say in a loud voice, "Boy, I'd sure like to eat that pussy"; "Stick that snatch out there where we can see it baby"; and "My God, look at those titties wiggle." In addition, there were "Ya Ho" shoutings, clapping and whistling by several male customers.

2. On September 30, 1969, respondent did use the services of a female entertainer, Teresa Macias Zavala, to perform on the stage area in the above-designated licensed premises, while completely nude, thereby exposing her private parts, including her pubic hair, vulva, and bare buttocks to the view of patrons present in said premises.

a. Said entertainer, while performing on the stage, gyrated her hips in a slow, undulating manner, and thrust her pelvic area forward

in slow, defined movements, exposing her pubic hair and the outer lips of her vagina to the patrons for approximately four to five minutes.

b. During this nude performance, a male patron made a loud comment, "Open them lips, Baby."

3. On October 3, 1969, respondent did use the services of a female entertainer, Joelie Micah Kornfeld, to perform on the stage area in the above-designated licensed premises, while completely nude, thereby exposing her private parts, including her pubic hair, vulva, and bare buttocks to the view of the persons present in said premises.

a. Said entertainer, while performing on the stage, faced a male patron while bending her knees slightly, with legs apart while extending her clenched hands approximately twelve inches apart and to the front as if holding the patron's head, then in rhythm to the music, she thrust her pelvic

area to and fro, as she brought both arms back and forth, suggesting sexual activity. This routine was repeated with several other patrons.

b. Said entertainer, while performing on the stage, did repeat this routine with several other patrons, and while doing so, clearly exposed her pubic area and vaginal lips. During this routine, an unknown patron stated in a loud voice, "If you want me to get up there and kiss it, I will."

4. On October 9, 1969, respondent did use the services of female entertainers, Joelie Micah Kornfeld and Theresa Macias Zavala, to perform on the stage area in the above-designated licensed premises, while completely nude, thereby exposing their private parts, including their pubic hair, vulva, and bare buttocks to the view of persons present in said premises.

a. Said entertainer, Kornfeld, while performing on the stage, gyrated her hips in a slow,

undulating manner, and moved her body slowly, front to rear, side to side, during which time she exposed her pubic hairs to the audience.

b. Said entertainer Zavala, while performing on the stage, made up-and-down jerky movements of her torso and slow rhythmic side-to-side gyration of her hips, while moving about the entire stage, and exposed her pubic hairs and outer lips of the vagina.

c. During Zavala's dance, an unidentified male patron, seated at a table, front center of the stage, stated, "Oh, wow, you sure got a fine puss, baby."

5. On October 10, 1969, respondent did use the services of female entertainers, Ernestine Sutton and Sharon Ann Kerney, to perform on the stage area in the above-designated licensed premises, while completely nude, thereby exposing their private parts, including their pubic hair, vulva, and bare buttocks to the view of the persons present in said premises.

a. Said entertainer, Sutton, while performing on the stage, undulated her hips and swung her arms around exposing her pubic hair and the lips of her vagina; numerous times she stopped in front of patrons, bent her knees slightly and undulated her body back and forth, during which time the lips of her vagina were clearly visible.

b. Said entertainer, Kerney, while performing on the atage, undulated her hips to and fro and back and forth and swung her arms around, during which time the lips of her vagina were clearly visible.

c. During Kerney's dance, an unknown patron at the bar threw a one dollar bill on the stage and stated in a loud voice, "Let's see that snatch, baby. Pick up the buck without using your hands."

6. On November 13, 1969, respondent did use the services of a female entertainer, Joelie Micah Kornfeld, to perform on the stage area in the above-designated licensed

premises, while completely nude, thereby exposing her private parts, including her pubic hair, vulva, and bare buttocks to the view of patrons present in said premises.

a. Said entertainer, while performing on the stage, clad only in a G-string with the panels placed in such a position so as to fully expose her pubic hairs and the lips of her vagina, stood in front of a patron at a distance of approximately three feet and slowly undulated the lower portion of her body in a back and forth motion.

b. While said entertainer was performing on the stage as above, an unidentified male patron remarked, "It's about time, I was getting ready to blow my fucking wad," "Let that breast hang out," and "Come here, let me screw it."

c. Said entertainer, while performing on the stage, completely nude, spread apart her legs and put her arms over her head while standing near the outer perimeter of the stage and slowly gyrated her hips in a circular motion.

d. Said entertainer's motions

brought various statements from the male patrons both about the stage and through the location of "I'd fuck a snake right now if it slid by." That box is so big you'd have to tie a 2 foot by 4 foot to your ass to eat it."

7. On August 27, 1969, during business hours, a female entertainer, Verna Chanora Dean, while dancing on a raised stage located in the above-designated licensed premises, did engage in the following conduct:

a. Said entertainer moved around the entire stage, while completely nude, exposing her vagina and anus areas to the view of male patrons.

b. Said entertainer, while moving about the stage, would kick her feet above head level, thus exposing her vaginal area to view of seated male patrons.

8. On August 28, 1969, during business hours, a female entertainer, Patricia Ann Holly, while dancing on a raised stage located in the above-designated licensed premises, did engage in the following conduct.

a. Said entertainer moved about the stage, while completely nude, and upon coming within two feet of seated male patrons, would kick her feet above head level, thus exposing her vaginal area to the view of the patrons.

b. During this described performance, a patron was heard to comment, "She's sending me love signals," and "You've got it baby, but that fat bitch's thing flaps."

9. On August 29, 1969, during business hours, a female entertainer, Ernestine Sutton, while dancing on a raised stage located in the above-designated licensed premises, did engage in the following conduct:

a. Said entertainer moved about the stage, while completely nude, and exposed her pubic and vaginal areas to the view of seated male patrons.

b. Said entertainer, while completely nude, would bring her exposed pubic area to within six

inches of male patrons' faces and then move her lower body backward and forward.

c. Said entertainer moved her fully exposed pubic area to within three inches of the face of a seated male patron. Said patron had his tongue extended towards the entertainer's pubic area.

d. A male patron placed a glass containing a burning candle between the entertainer's feet, directly below her pubic area, while stating, "Baby, maybe this will get you hot."

10. On September 2, 1969, during business hours, a female entertainer, Olga Lira Rojas, while dancing on a raised stage located in the above-designated licensed premises, did engaged in the following conduct:

a. Said entertainer moved about the stage area, while completely nude, and exposed her pubic,vaginal and anus areas to the view of seated male patrons.

b. Said entertainer, while completely nude, stood in the center

of the raised stage. She placed her feet approximately three feet apart, bent her body backwards from the waist,thrusting her pelvic region forward towards seated male patrons, thus exposing her vaginal area.

c. Said entertainer, while completely nude, stood on the raised stage with her back towards the audience. She bent forward at the waist, as if to pick something up from the floor of the stage. This action caused her buttocks to part, thus exposing her anus to seated male patrons.

d. During the above-described conduct by said entertainer, the following comments were heard spoken by male patrons, "Let me see those beautiful hairy lips." "Come here and put your box in this, it's yours," while holding up a folded $5.00 bill. "I'm hungry, bring me that hair pie." "Sit on his face, he'll heat it."

11. On September 3, 1969, during business hours, a female entertainer, Kathleen Walker, while dancing on a raised stage located in the above-designated licensed premises, did engage in conduct as follows:

a. Said entertainer, while completely nude, would bring her exposed pubic area to within four to five inches of patrons' faces and then move her lower body backward and forward.

b. Said entertainer moved about the stage, while completely nude, and exposed her pubic and vaginal areas to view of seated male patrons.

c. A seated male patron held his arms outstretched towards said entertainer while extending his tongue and licking his lips as the entertainer danced directly in front of this patron.

12. On August 9, 1969, respondent did use the services of a female entertainer, Jeanette Elise Dobie, to perform on the stage area in the above-designated licensed premises, while completely nude, thereby

exposing her private parts, including her pubic hair, vulva, and bare buttocks to the view of persons present in said premises.

13. On August 9, 1969, respondent by and through his employee and agent Betty Gayle Rigsby, as a dancer and entertainer and while dancing and entertaining on a stage in said premises, the said female did divest herself of all clothing, and performed completely nude, thereby exposing her private parts, including her pubic hair, vulva and bare buttocks to the view of persons present in said premises.

14. On August 20, 1969, respondent did use the services of a female entertainer, Kathleen Walker, to perform on the stage area in the above-designated licensed premises, while completely nude, thereby exposing her private parts, including her pubic hair, vulva, and bare buttocks to the view of persons present in said premises.

15. On August 21, 1969, respondent by and through his employee and agent Esther Cady Wood, as a dancer and entertainer and while dancing and entertaining on a stage in said premises, the said female did divest herself of all clothing and

performed completely nude, thereby exposing her private parts, including her pubic hair, vulva and bare buttocks to the view of persons present in said premises.

The conduct and activity described above in subparagraphs 1, 2, 3, 4, 5, 6, 8, 9, 10 and 11 did create conditions then and there contrary to public welfare and morals.

The conduct and activity described hereinabove in paragraphs 7, 12, 13, 14 and 15 did not per se create conditions then and there contrary to public welfare and morals.

SPECIAL FINDINGS:

Pursuant to stipulation, it is found to be true that:

1. There are lighted signs on the exterior of the above-described licensed premises which read "bottomless dancers" and "totally nude dancing".

2. An admission fee of $1.00 is charged patrons entering the above-described premises.

DETERMINATION OF ISSUES:

Grounds for the suspension or revocation of respondent's license were established as to subcounts 1, 2, 3, 4, 5, 6, 8, 9, 10 and 11 of Count I, in that respondent permitted conduct to occur on the licensed premises which was contrary to public welfare and morals in violation of Article XX Section 22 of the California Constitution, and Section 24200(a) of the Business and Professions Code.

Grounds for the suspension or revocation of respondent's license was not established as to subcounts 7, 12, 13, 14 and 15 of Count I, in that respondent did not permit conduct to occur on the licensed premises which was contrary to public welfare and morals in violation of Article XX Section 22 of the California Constitution or Section 24200(a) of the Business and Professions Code.

PENALTY OR RECOMMENDATION:

Count I: The license is suspended for thirty (30) days as to each of subcounts 1, 2, 3, 4, 5, 6, 8, 9, 10 and 11, to run concurrently.

The accusation is dismissed as to subcounts 7, 12, 13, 14 and 15.

Dated at Los Angeles, California; November 5, 1970

Helen L. Gallagher

HELEN L. GALLAGHER,
Hearing Officer
Office of Administrative Procedure

HLG:fr

APPENDIX B

Filed Jan 18 1972
Alcoholic Beverage
Control Appeals
Board

BEFORE THE ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Accusation against ROBERT E. POFF dba 1st King 14401-03 S. Western Avenue Gardena on-sale general license Respondent under the Alcoholic Beverage Control Act.	AB-3589 File No. 1867; Reg. No. 9739; H/O: Bellows and Gallagher Time & Place of Hearing: May 27,1971, at 2 p.m. 314 West First Street Los Angeles, California For Department: Honorable Evelle J. Younger Attorney General Mark Leicester Deputy Attorney General For Appellant: Kenneth Scholtz,Esq.

In this matter Reg. 8858 and Reg. 8928 were consolidated with Reg. 9739 (AB-3589). Subparagraphs 1 through 5 of Reg. 8928 were added to count I of Reg. 9739, and numbered 7 through 11; subparagraphs 1 through 4 of Reg. 8858 were added to count I of Reg.

9739, and numbered 12 through 15. The department affirmed a proposed decision of a hearing officer of the Office of Administrative Procedure determining that grounds for suspension or revocation of appellant's license were established as to subcounts 1, 2, 3, 4, 5, 6, 8, 9, 10 and 11 of count I, in that appellant permitted conduct to occur on licensed premises which was contrary to public welfare or morals in violation of article XX, section 22 of the California Constitution and section 24200(a) of the Business and Professions Code. Furthermore, that grounds for the suspension or revocation of appellant's license were not established as to subcounts 7, 12, 13, 14 and 15 of count I, and, accordingly, were dismissed. As a penalty, appellant's license was suspended for 30 days as to each of subcounts 1, 2, 3, 4, 5, 6, 8, 9, 10 and 11 to run concurrently.

Instant appeal is based upon the grounds:

> "(a) The Department has proceeded without and in excess of its jurisdiction;

"(b) The decision is not supported by the findings;

"(c) That errors of law were made by the Hearing Officer as reflected by the transcript of the proceedings;

"(d) That findings are not supported by substantial evidence in the light of the whole record."

The department's decision contains the following:

[At this point the opinion recites the Findings of Fact as set forth at page A-4 through A-17.]

Review of the record establishes the accusation was amended by striking the words "lewd" and "indecently" wherever they appeared therein. As amended, the parties stipulated that the facts alleged in subcounts 12, 13, 14 and 15 were true; also, that if witnesses for the department were called, they would testify the same as the facts alleged in the accusation relative to subcounts 1, 2, 3, 5, 6, 8, 9, 10 and 11 of count I.

Exhibits pertaining to criminal

proceedings, offered by appellant, were received into evidence.

Appellant presented Mr. John Wasserman, a critic for a newspaper (San Francisco Chronicle), who testified as an expert witness relative to contemporary standards as to nude entertainment within the State of California. In summary, he stated that, to his knowledge, public morals have not been disturbed by nude entertainment (R.T. 80, 83, 84); comments by patrons are not relevant to the issue of nude entertainment nor community standards (R.T. 85); numerous people attending theaters specializing in sex films is a reflection of community standards (R.T. 87); in his opinion, nude dancing does not affect public welfare or morals (R.T. 90), and that comments by patrons did not change his opinion (R.T. 113).

Dr. Stanley K. Fitch, a psychologist, testified on behalf of appellant that in his opinion, speaking as a psychologist, there was no relationship between nude dancing in bar and public welfare or morals; that if there were any relationship, it would have to be on the plus side (R.T. 132); verbal or other behavior between performers

and patrons would have no effect upon his opinion. (R.T. 156).

Appellant presented extensive argument in his opening brief with respect to the following:

1. Article XX, section 22 of the California Constitution, which permits the department to revoke or suspend a license for conduct contrary to public welfare or morals, is unconstitutionally broad when applied to speech and expression protected by the First Amendment.

A. A valid governmental purpose may not not be achieved by means that restrict the exercise of constitutionally protected rights.

B. The department's power to suspend or revoke licenses for conduct contrary to public welfare or morals is unconstitutionally broad as applied in this case.

With respect to the performance of a dance, such form of expression prima facie enjoys protection of the First Amendment of the United States Constitution and only loses such protection upon a showing of obscenity; that in this case, the department did not allege that any of the conduct was

lewd or obscene and no violation of the Penal Code was alleged to have occurred.

2. The decision of the department is not supported by substantial evidence in light of the whole record or by the findings, nor does the evidence contain facts tending to show that the acts complained of were contrary to public welfare or morals.

Under this heading appellant argues that it is well settled that neither nudity nor depiction nor display of sexual activities are necessarily obscene (in re Giannini, 69 Cal.2d 563, 72 Cal.Rptr. 655); that activities of bare breasted waitresses are not necessarily lewd or obscene. (Robbins v. County of Los Angeles, 248 Cal.App.2d 1, 56 Cal.Rptr. 853.) The depiction of nudity in photographs and pictures is granted constitutional protection (In re Panchot, 70 Cal. 2d 105, 73 Cal.Rptr. 689; People v. Rosakos, 268 Cal.App.2d 497, 74 Cal.Rptr. 34; People v. Noroff, 67 Cal.2d 791, 63 Cal.Rptr. 575); that forms of entertainment or communication which contain depictions of sexual acts are not obscene on their face (Jacobellis v. Ohio, 378 U.S. 184, 12 L.Ed.2d 793); that simulated sexual acts performed by actors

during the course of a play are not necessarily lewd and must be considered with regard to the entire context of the play. (Dickson v. Municipal Court, 267 Cal.App.2d 789, 73 Cal.Rptr. 587; Barrows v. Municipal Court, 1 Cal.3d 825.)

Appellant further contends that the record does not contain evidence sufficient to establish that any of the dancers were obscene; that even if the department's power is not limited by the First Amendment, the record in this case fails to establish that any of the conduct disclosed was contrary to public welfare or morals.

3. The presentation of nude dancing on a stage before an audience of consenting adults may not be prohibited.

It is this board's opinion that we are not here concerned with the determination whether the conduct set forth in the findings is obscene, nor that a penal statute has been violated. The issue before us is whether the conduct on the premises is contrary to public welfare or morals. The department's authority in this area, pursuant to Article XX, section 22 of the

California Constitution and section 24200(a) of the Business and Professions Code has been repeatedly recognized by the courts. (Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control, 2 Cal.3d 85.)

As to the case before us, the findings relative to subcounts 9 and 11, respectively, read as follows:

> "9. On August 29, 1969, during business hours, a female entertainer, Ernestine Sutton, while dancing on a raised stage located in the above-designated licensed premises, did engage in the following conduct:
>
> "a. Said entertainer moved about the stage, while completely nude, and exposed her pubic and vaginal areas to the view of seated male patrons.
>
> "b. Said entertainer, while completely nude, would bring her exposed pubic area to within six inches of male patrons' faces and then move her lower body backward and forward.
>
> "c. Said entertainer moved her

fully exposed pubic area to within three inches of the face of a seated male patron. Said patron had his tongue extended towards the entertainer's pubic area.

"d. A male patron placed a glass containing a burning candle between the entertainer's feet, directly below her pubic area, while stating, 'Baby, maybe this will get you hot.'"

* * *

"11. On September 3, 1969, during business hours, a female entertainer, Kathleen Walker, while dancing on a raised stage located in the above-designated licensed premises, did engage in conduct as follows:

"a. Said entertainer, while completely nude, would bring her exposed pubic area to within four to five inches of patrons' faces and then move her lower body backward and forward.

"b. Said entertainer moved about the stage, while completely nude, and exposed her pubic and vaginal

areas to view of seated male patrons.

"c. A seated male patron held his arms outstretched towards said entertainer while extending his tongue and licking his lips as the entertainer danced directly in front of this patron."

Furthermore, when certain female entertainers were performing on the stage in licensed premises, which generally included undulating their hips backward and forward, while completely nude -- thereby exposing their private parts, including pubic hair, vulva and bare buttocks to the view of those present -- the following comments, set forth in the findings, were made by patrons:

" . . . 'Boy, I'd sure like to eat that pussy'; 'Stick that snatch out there where we can see it baby'; and 'My God, look at those titties wiggle.' In addition, there were 'Ya Ho' shoutings, clapping and whistling by several male customers."

(Finding 1, b.)

" . . . 'Open them lips, Baby.'"

(Finding 2, b.)

" . . . 'If you want me to get up there and kiss it, I will.' "

(Finding 3, b.)

" . . . 'Oh, wow, you sure got a fine puss, baby.' "

(Finding 4, c.)

" . . . 'Let's see that snatch, baby. Pick up the buck without using your hands.' "

(Finding 5, c.)

" . . . 'It's about time, I was getting ready to blow my fucking wad,' 'Let that breast hang out,' and 'Come here, let me screw it.' "

* * *

" . . . 'I'd fuck a snake right now if it slid by.' 'That box is so big you'd have to tie a 2 foot by 4 foot to your ass to eat it.' "

(Finding 6, b and d.)

" . . . 'She's sending me love signals,' and 'You've got it baby, but that fat bitch's thing flaps.' "

(Finding 8, b.)

" . . . 'Let me see those beautiful hairy lips.' 'Come here and put your box on this, it's yours,' while holding up a folded $5.00 bill. I'm hungry, bring me that hair pie.' 'Sit on his face, he'll heat it.' "

(Finding 10, d.)

The record indicates that the licensee was generally on the premises every day (R.T. 115); he and the manager would observe the nude performers and the patrons to see what they were doing. (R.T. 121.) Mr. Poff stated that during the ten or eleven months in which he has presented nude entertainment, he has had a uniformed guard or an employee watch the patrons, and did not recall ever having to eject a patron for being unruly. (R.T. 119.)

It is our opinion that the conduct between performers and patrons described in subcounts 9 and 11 and the comments of patrons documented in other cited subcounts, which were knowingly permitted by licensee over an extended period of time, created situations which were per se contrary to public welfare or morals and subjects licensee to disciplinary action. (Boreta

Enterprises, Inc. v. Dept. of Alcoholic Bev. Control, supra, 2 Cal.3d 85.)

The issues raised by appellant, which were also considered in another case pertaining to licensee (AB-3451), involving similar conduct, are deemed to be without merit.

This board determines that the evidence supports the findings and the findings support the department's decision herein.

In view of the foregoing, the decision of the Department of Alcoholic Beverage Control in the present proceeding is hereby affirmed.

HUGH M. BURNS, CHAIRMAN
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

We Concur:
Eugene V. Lipp
Kay Valory

Sacramento, California
January 14, 1972

APPENDIX C

Los Angeles, Cal. Feb 24 1972

TITLE (Poff) No. 39853
(A. B. C., ETC., ET AL)

THE COURT: Petition for writ of review denied.

CLAY ROBBINS, Clerk

APPENDIX D

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

MAR 22 1972

DEAR SIR: I have this day filed Order

HEARING DENIED

In re: 2 Civ. No. 39853

Poff

vs.

Department of Alcoholic Bev. Control

Respectfully,

G. E. BISHEL
Clerk